

CONTAMINATED LAND: CLEAN UP AND CONTROL

I. INTRODUCTION

1 On 24 March last year, the Secretary of State for Scotland announced a wide-ranging review of the underlying issues involved in dealing with the problem of contaminated land. As part of this review, The Scottish Office is participating in an Interdepartmental Review Committee which includes the Department of the Environment, the Welsh Office and other Government departments.

2 This consultation paper - 'Contaminated Land: Clean-up and Control' sets out the considerations that bear on deciding how to apportion liability for contamination among polluters, owners and the public sector. It summarises the main issues and includes The Scottish Office's preliminary conclusions on seven key aspects. Respondents are invited to comment on these conclusions. A parallel but separate consultation exercise is being carried out in England and Wales by officials from the Department of the Environment and the Welsh Office, reflecting the different legal and institutional framework south of the Border.

3 The seven main issues set out in paragraphs 34-92 have been identified by the Interdepartmental Review Committee as central to its deliberations.

II. THE CURRENT POSITION

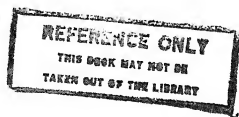
The policy framework

4 UK policy towards land contamination fits within an overall environmental policy, summed up in paragraph 1.24 of *This Common Inheritance: Britain's Environmental Strategy*. That stated:

"Action on the environment has to be proportionate to the costs involved and to the ability of those affected to pay them. So it is particularly important for Governments to adopt the most cost-effective instruments for controlling pollution and tackling environmental problems. And we need to ensure that we have a sensible order of priorities, acting first to tackle problems that could cause most damage to human life or health and could do most damage to the environment now or in the future."

5 The aim is to control actions which may cause damage to the environment or harm to human health. Where damage has already taken place, remediation should be encouraged where worthwhile and further damage prevented or minimised. The Government is also keen to promote the re-use of brownfield sites to reduce the pressures on greenfield sites. These aims are consistent with the principles of sustainable development, defined in the Bruntland Report¹ as:

¹ Report of the 1987 World Commission on Environment and Development.



"Development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

6 The Government believes that regulation is necessary to help to achieve these goals. However, regulation has shortcomings, such as the cost of monitoring, the time taken to reflect scientific and technical advances, and insufficient flexibility. Accordingly, the Government is looking for ways to control pollution which overcome some of those shortcomings by devising a framework that will encourage effective market mechanisms in areas such as the identification and clean-up of contamination, and for the promotion of suitable development.

7 The Government's policy towards the remediation of contaminated land is based on the 'suitable for use' approach: the removal of any unacceptable risks to human health or the environment, taking into account the actual or intended use of the site in question. This does not preclude an owner, occupier or developer from undertaking earlier or more thorough action, if he wishes to do so.

8 The main aims of the 'suitable for use' approach are:

to control unacceptable risks from existing contamination;

to concentrate resources on the treatment of existing contaminated sites which pose unacceptable risks to health or the environment (without inhibiting additional voluntary or opportunistic treatment); and

to ensure that the efficient working of market forces affecting the clean-up, development, and use of land is not jeopardised by misplaced fears about contamination, the danger it may pose, and the liabilities that may arise.

9 The costs of investigation and, where appropriate, remediation depend on the nature of the pollutants, the nature and environmental setting of each site, and the intended standard of treatment. The costs would be substantially greater if land had to be restored to its original state or if land had to be treated to a standard which rendered it safe for any purpose.

10 In most cases, investigation and remedial work can be spread over many years, even decades, depending on the immediacy of any risks and on the opportunities for action, such as the redevelopment of a site. In some cases, the high cost of remedial work compared to the value of sites for redevelopment will mean that owners will not take any action. Sites which remain unused may contribute to general blight in the areas concerned, inhibiting economic development in those localities.

11 The private sector is thought to undertake about half of the current expenditure on dealing with contamination in Scotland. Any change of approach which increased that expenditure or brought forward the burden of liabilities to be met in the early years would have significant financial effects on companies in the private sector. That could limit their ability to finance

remediation work and could even lead to a decrease rather than an increase in expenditure on clean-up.

12 Public authorities incur expenditure on regulating activities which might cause contamination, on regulating remedial work and on carrying out remedial work themselves. They may also contribute to private sector projects which include remediation work. It is impossible to quantify a sum spent by public authorities on preventing contamination as such work is part of all their regulatory activities. In addition, Scottish Enterprise and Highlands and Islands Enterprise and their local enterprise companies have very substantial resources available for environmental improvement activity, including decontamination works.

The legal framework

13 Scotland has a long-established regulatory regime based on statute law. The regime includes various combinations of:

powers to control the operation of processes and the provision of services;

criminal sanctions against polluters; and

powers to impose obligations on polluters and others to clean up damage to their land or to meet the costs of doing so.

14 The main regulators with an interest in tackling contamination are:

Her Majesty's Industrial Pollution Inspectorate (HMIPI) which is responsible for integrated pollution control (IPC) of certain prescribed industrial processes, requiring the application of the Best Available Techniques Not Entailing Excessive Cost (BATNEEC), and has powers under section 27 of the Environmental Protection Act 1990 (EPA);

the district and islands councils which are responsible for "controlled waste" and have powers under section 59 of the EPA to deal with illegally deposited waste; they would also have powers under section 61 of the EPA if it were in force; they are also responsible for public health and have powers under the Public Health (Scotland) Act 1897 to deal with nuisances which may include land contamination; and

the river purification authorities (RPAs - the 7 river purification boards and the islands councils) which are responsible for "controlled waters" and have powers under section 46 of the Control of Pollution Act 1974. The RPAs also share some responsibility for the authorisation of processes subject to integrated pollution control.

15 Several of the existing regulators will be affected by the establishment of the proposed Scottish Environment Protection Agency (SEPA). SEPA will assume the responsibilities of HMIPI, the river purification authorities, and the waste regulation and local air pollution control functions of the district and islands councils.

16 Planning authorities may attach conditions to the grant of planning permission to ensure that the proposed development will not expose future users or occupiers of the site, to hazards associated with contamination. The presence of contaminants which, although potentially harmful to health, do not damage buildings or affect any ancillary services, need not necessarily preclude development for commercial or industrial purposes. Sites which are known to be contaminated will normally require remedial action before any form of construction begins. Planning conditions can also ensure that land restoration is carried out when a site is no longer used for its original purpose.

17 The way in which regulators exercise their powers is, of course, subject to judicial review by the courts. That enables a regulator's decision to be challenged. Such a challenge may be made if the regulator fails to consult or to use powers properly in making a decision.

18 The statutory arrangements operate alongside a long-established system of common law which allows a person or body ("the pursuer") to seek redress for damage or loss to his private interests caused by another ("the defender") on various grounds including nuisance and negligence. On both of these grounds liability in Scots law is fault-based. Others may be brought into the action and, potentially, made to share liability for any award of damages or expenses. It is for the pursuer to decide how any damages should be spent, although the costs of remediation can help to decide the size of the award. Therefore the award of damages will not necessarily lead to remediation of a contaminated site and deterrence is incidental to the damages awarded.

19 Another possible outcome of a civil case would be for the court to grant the pursuer an interdict to stop the defender from causing loss to the pursuer. It is hard to generalise about the way in which the common law works in the context of the environment; that will depend on the facts of each case, including rights and obligations under property and contract law.

20 The House of Lords has made an important judgement in this area in the English case of Cambridge Water Company v. Eastern Counties Leather. The water company sued the leather company for damages in respect of spillages of solvents at the tannery which had contaminated ground waters supplying a borehole. The House of Lords ruled that the leather company was not liable since that damage was not reasonably foreseeable at the time of the spillages. Although this case is not directly relevant to Scots Law, The Scottish Office is a member of the Interdepartmental Review Committee which is currently considering the implications of the judgement.

21 There are some clear areas of interaction between the common law and the regulatory arrangements. A pursuer who faces a regulatory obligation may be able to use the common law to try to pass some or all of the burden to others, if they can be shown to have shared the responsibility. It should be noted that the existence of an authorisation or licence granted by a regulator does not normally insulate a person against liability.

22 The effects of land contamination may not become apparent for many years and polluting events can pass unnoticed at the time. In such circumstances regulatory obligations or civil liability may be retroactive. Equally, the law may have changed to tighten standards between the initial

contamination and the detection of damage. The question then arises as to whether such a change should apply retrospectively to penalise an action which was lawful at the time.

23 Civil law has its own rationale and should not be expected to achieve the purposes of regulation. It can, however, make markets work more efficiently. Because the civil law concerns private interests, it may well prove an acceptable means of apportioning liabilities, even if not in a way that precisely matches the effects of regulatory powers. At Common Law, pursuers generally have to establish some link or causation between the acts or omissions of the defender and actual or potential damage. In practice, this can be almost as difficult for the pursuer to discharge as establishing fault.

24 The Review has also been carried out against three international developments relating to liability for environmental damage. The first was the experience of lenders, insurers and other businesses of meeting liabilities under the US "Comprehensive Environmental Response, Compensation and Liability Act 1980" ("US Superfund"). Secondly, the Council of Europe was completing its "Convention on Civil Liability for Damage resulting from activities dangerous to the environment" (known after it opened for signature in June 1993 as "the Lugano Convention"). Thirdly, the Commission of the European Communities was drafting its "Green Paper on Remedying Environmental Damage" (issued in May 1993; "the EC Green Paper").

25 In June, Ministers announced that the UK would not sign the Lugano Convention. In October, the Government sent to the EC Commission its formal, written response to the EC Green Paper ("the UK Response"), arguing that, in accordance with the principle of subsidiarity, it saw no case for general Community legislation on civil liability for environmental damage. The House of Lords Select Committee on the European Communities has also considered the Green Paper and issued a report in December 1993 ("the House of Lords Report") recommending that it would be prudent for the Community to adopt a "framework" directive requiring a programme of remediation of past pollution. The Green Paper is the subject of continuing debate to which the UK is contributing. In the meantime, this paper reflects the views set out in the UK Response.

26 Regulators often proceed by negotiation, with formal action taken only as a last resort. They may have to overcome a number of defences before enforcing a regulatory obligation or establishing a common law liability. In some circumstances, a regulator may only be able to enforce a regulatory obligation where there has been a breach of regulatory authorisation, consent or direction. For example, action under section 27 of the EPA in relation to a process authorised under IPC can only be taken after commission of a criminal offence under section 23 of the EPA.

III. THE CASE FOR CHANGE

27 To ensure a more co-ordinated and effective approach to pollution control, the Government has announced that, subject to the approval of Parliament, it will set up the Scottish Environment Protection Agency, combining the functions of HMPI and the river purification authorities and the waste regulation and local air pollution control functions of the district and islands councils. This will simplify the regulatory system, concentrating responsibility for regulation of the most difficult environmental problems in one authority. This would also meet the current criticism that uncertainty can arise as to precisely which regulator does what.

28 There also appears to be uncertainty about when regulators will act. Often they have a mixture of duties (under which they are required to act) and powers (under which the law allows them some discretion). Whether exercising a power or discharging a duty, the regulator must always operate within the terms of the governing legislation. An authority that fails to do so is open to challenge under judicial review.

29 Where a regulator itself takes action, it may normally seek to recover its costs. It cannot, of course, recover costs for actions outwith the scope of its powers. However, this scope varies from regulator to regulator. For example, section 61 of the EPA, if implemented, would require a waste regulatory authority to consider "hardship" in deciding whether, and, if so, how much of its costs to recover. The high cost of clean-up operations can also inhibit regulators from taking action.

30 Depending on circumstances and on the wording of the relevant statute, regulators can enforce obligations on owners, occupiers or others. Some provisions apply to persons who caused or knowingly permitted the contamination and some make provision for placing an obligation on the owner of the site. In particular, the phrase "owner for the time being" in section 61 of the EPA Act has been criticised as unduly open-ended.

31 Where a regulatory obligation exists, the person facing that obligation may seek to use a common law action to transfer all or part of the cost of meeting that obligation to others, by proving that another person or organisation was responsible for the damage. This means that one set of people could face regulatory obligations for contamination whilst the common law could allow them to recover the costs of meeting the obligations from others.

32 This section of the paper has highlighted a number of differences between the relevant provisions and possible uncertainties about their application or effect. A measure of flexibility and lack of uniformity may be justified where the circumstances are very different. Nevertheless, there is clearly some scope for greater consistency within the statutory regime which should continue to interact with the common law to enable individuals and organisations to protect their own interests. Differences or uncertainties do not, in themselves, create a prima facie case for making changes. The danger is that a minor statutory change could prove to have knock-on effects which are not foreseen at the outset.

IV. THE KEY ISSUES

33 The Review Committee has identified seven key issues arising from the concerns about the existing arrangements. These are set out as follows:

Issue A: What should the objectives be within the Government's policy?

Issue B: How should the statutory framework meet the objectives?

Issue C: What relationship should the statutory framework have with the common law?

Issue D: Should there be any extension of strict liability?

Issue E: Who should pay for putting environmental damage right?

Issue F: How should markets be provided with information?; and

Issue G: What other roles should public sector bodies have?

Each part of this section looks at the main considerations bearing on each issue, discusses possible changes, and presents The Scottish Office's preliminary conclusions.

Issue A What should the objectives be within the Government's policy?

34 The broad aims of the Government's policy on the control of pollution and liability for clean-up of contaminated land are set out earlier in the paper. They are:

to prevent further contamination;

to control unacceptable risks from existing contamination within the terms of the 'suitable for use' standard;

to concentrate resources on the treatment of existing contaminated sites which pose unacceptable risks to health or the environment (without inhibiting additional voluntary or opportunistic treatment); and

to ensure that the efficient working of market forces affecting the clean-up, development, and use of land is not jeopardised by misplaced fears about contamination, the danger it may pose, and the liabilities that may arise.

35 These constitute a sustainable approach to the problems of land contamination, recognising that land is not only a finite resource which must be secured for the future, but that the condition of land may also have an impact on other aspects of the environment.

36 Paragraphs 9-12 describe the scale and nature of the problem and note that these could lead to significant burdens on both private and public finances. The priorities for action must

therefore balance the need to deal with the burden of past pollution against the resource costs of doing so.

37 Due to its direct effect on land value, the condition of land is also a major factor in economic activity and development. The actual or contingent costs of contamination can affect decisions on purchase or disposal, value as collateral, and future development. Policies which ignored the commercial perceptions of the risks from contamination might simply increase uncertainty and reduce the amount of remedial work undertaken voluntarily by owners and occupiers to keep or bring contaminated land into use. As a result the pressure on greenfield sites would grow.

Preliminary conclusion

38 *The objectives of the arrangements for dealing with contaminated land could be:*

to prevent or minimise new pollution where practicable and to place the onus on the polluter to remedy or to render harmless any pollution which does occur;

to tackle existing contamination which poses unacceptable actual or suspected risks to health or the environment;

to improve sites in line with the 'suitable for use' approach as and when hazards are tackled, the private sector decides to develop land, or public authorities prepare land to promote development;

to encourage development of, and an efficient market in, land which has been subject to potential or actual contamination; and

to minimise financial and regulatory burdens.

Issue B How should the statutory framework meet the objectives?

39 The regulatory framework of key statutes and main regulators is described in paragraphs 13-16. Its main purposes are:

to prevent or minimise new contamination;

to require its clean-up where contamination has occurred; and

where that cannot be achieved by other means, to enable the regulators to take direct action and to recover their reasonable costs from those responsible for pollution.

40 The statutory pollution control powers enable regulators to prevent or minimise future contamination in four broad ways:

- (a) by controlling polluting activities through licences, authorisations or consents so that polluting incidents are made less likely;
- (b) through the deterrent effect of the threat of prosecution and criminal sanctions;
- (c) through the deterrent effect of the threat of the cost of meeting regulatory obligations; and
- (d) through providing advice and information about the causes of contamination, the risks it poses to health and the environment, and ways of avoiding them.

41 The provisions for requiring remedial work and, in some circumstances, carrying it out and recovering the costs come into play once contamination has happened. Regulators' powers are intended to ensure restoration where appropriate and to protect the public interest in the environment, especially in the "unowned environment"².

42 Planned purchases of land can fall through because of actual or perceived contamination and the private sector is already responding to the deterrent effect of regulatory obligations. For example, the Chemical Industries Association provides advice and information about contamination for its members; the CBI intends to promote awareness of the issues among its members; and some firms undertake environmental audit and monitoring and lenders and insurers are helping to promote this.

43 There is a tension between leaving the regulators room to exercise some discretion and having clear environmental standards for owners of land. At least, the problems caused by the involvement of more than one regulator should be reduced following the creation of SEPA.

Sharing burdens for liability

44 Paragraph 18 describes how the common law may enable a person or body to share the burden of a regulatory obligation with others not identified by statute and the issue of who should pay for the restoration of environmental damage is discussed further in paragraphs 64-74. However, it is important to recognise that land contamination is not always caused by a single polluting incident and may take place gradually over a number of years. This means that responsibility for some polluting incidents is shared amongst successive 'polluters'. There is therefore a need for a mechanism through which the regulatory burden should be shared between those responsible.

45 One possible liability regime would be 'joint and several' liability. Joint and several liability currently exists at common law where 2 or more people are liable for damage caused. Any one person may be sued for the entire loss and then seek to recover a "just contribution" towards

² The unowned environment includes the air, the sea and wild animals and plants.

the damages he has paid to the pursuer from the other liable parties. In the US, those with the greatest financial assets have sometimes faced liabilities which are disproportionate to their responsibility for an operation or site. As a result, funds have been withheld from development schemes for contaminated sites. There would also be particular problems for banks who hold loans which are secured on contaminated property in the UK, compared with the situation in other European jurisdictions. In the UK, lenders risk acquiring liabilities beyond the value of the loan when taking possession of the property; in Europe, however, ownership is vested in the court, and only the advance and related sums are at risk.

46 Further problems may arise when contamination is treated to ensure that the land is suitable for a particular use. Later on, the use of the land may change or further remediation work may become necessary. A developer who carried out the initial, worthwhile work would consider it unfair if he were made liable for all or part of the costs of the further work. Fear of such further liability could inhibit ongoing remedial work carried out by the private sector. At present, there are unique exemptions from criminal liability or regulatory obligations under the Control of Pollution Act 1974 in respect of water permitted to escape from abandoned mines which contaminates "controlled waters".

Preliminary conclusions

47 *There is a continuing need for a regulatory framework to prevent or minimise new pollution, and to require action in respect of existing contamination. Regulators must also continue to be able to take action themselves where that cannot be achieved by other means and to recover costs. There should be some harmonisation of the powers of the regulators whilst ensuring that their powers are appropriate to their particular function.*

48 *Voluntary action is preferable to formal enforcement action and regulators should do more to encourage it. They should be ready to offer help and advice, and should seek to provide a consistent framework so that markets can work efficiently. The creation of the SEPA (see paragraphs 86-92) will help in this respect.*

49 *Regulators should so far as appropriate be able to pursue parties other than the polluter for recovery of costs in cleaning-up contamination. The extent of liability should not be determined by availability of resources. It would be inequitable and damage markets if regulators were able to pursue the financial sector to an extent disproportionate to their responsibility or ahead of others who had more direct responsibility. Paragraph 71 includes proposals that regulators should act first against polluters and owners. Any limitations to joint liability should be practical and not open to abuse; and they would have to be weighed against the effects on public finances.*

50 *The justification for the special exemption for abandoned mines should be reassessed in the light of the conclusions emerging from the review.*

Issue C What relationship should the common law have with the statutory framework?

51 The common law position on contaminated land is described in paragraphs 18-23. Its purpose is to enable a pursuer to seek damages for, or prevent the occurrence of, damage to his property or person. It may affect a different set of people or bodies from those subject to regulatory action. A pursuer may recover some or all of the costs of meeting a regulatory burden by showing that a defender should share some of the responsibility. In this way the common law helps the regulatory regime to operate more fairly. It is up to the pursuer to decide how to spend any damages awarded following a successful action; they need not be spent on remedial work, even though the reasonable costs of such work will normally be taken into account by the court in determining the amount of damages.

Preliminary conclusions

52 *It is important that the common law should retain provision for individuals to share burdens with others and for the courts to determine the limit, if any, to individuals' exposure.*

53 *Civil law has its own rationale and should not be expected to achieve the purposes of regulation. For example, it may apportion liabilities in a way that does not precisely match the effects of regulatory powers. However, if the differences become too great, this can create tensions and uncertainties for private parties, and increase the burden placed on regulatory authorities.*

54 *A cautious approach should be adopted towards any statutory changes to civil law. However, its amendment should not be ruled out.*

Issue D Should there be any extension of strict liability?

55 Some regulatory obligations are strict whilst the common law and other regulatory provisions require the pursuer or regulator to establish some degree of fault (see paragraph 18). Strict liability is said to have the following advantages over a fault-based approach:

more certain (as the regulator or pursuer no longer has to overcome the additional burden of proving fault on the part of the potentially liable parties) and therefore of greater deterrent effect on potential polluters;

more efficient (because legal costs are limited and there is more chance of establishing a legal obligation to pay); and

more effective (because it is a more reliable means of generating clean-up funds or of forcing potential polluters to take preventive action or to seek insurance or other cover for their risks).

56 Some pressure for wider application of strict liability has come from international developments. It is an aspect of the Council of Europe Lugano Convention and is discussed in the



EC Green Paper on Remedying Environmental Damage. On the other hand, some commentators, including the Advisory Committee on Business and the Environment, and the property industry, have suggested that any extension to the application of strict liability would be a major disincentive to investment in certain industrial processes, in developing contaminated land, in carrying out remedial work or in trading in actually or potentially contaminated land.

57 It has been suggested that a range of defences against liability for environmental damage should be recognised, including:

- a) the action which gave rise to the contamination was not negligent;
- b) the action was acceptable at the time;
- c) the action conformed to the prevailing state of best knowledge and practice at the time (also known as the 'State of the Art');
- d) the action, if judged by a court now, ought to be tested against what a court would have thought of it at the time the event occurred;
- e) no-one could reasonably have foreseen the consequences of the action at the time (c.f. the House of Lords ruling in the Cambridge case);
- f) no-one could possibly have foreseen the consequences of the action at the time (a rather sterner test favoured by the House of Lords Select Committee on the European Communities in 1990 when considering EC proposals for civil liability for damage caused by waste);
- g) the action was in compliance with regulatory authorisations; and
- h) the action took place too long ago (that is, time limits on legal actions should be based on the occurrence of the polluting event rather than, as at present, on the subsequent discovery of its effects).

58 Such defences are argued to be fairer to the operator or defender. However, their general effect is to transfer, not to remove the liability. In some cases the effect would be to leave a pursuer without redress; in others it would tend to transfer the costs to the taxpayer. It needs to be considered whether that would be more equitable than allowing no such defence, and whether it is right to use public funds for the clean-up of damage caused, even if unwittingly, by private parties. Some commentators have argued for stricter liability for consequences of events from, say, 1993 because the current debate has changed attitudes towards pollution and has led to generally increased awareness of the risks.

Preliminary conclusions

59 *The current mixture of strict and fault-based regulatory approaches together with a fault-based civil regime strikes a broadly correct balance in regulatory and civil law between the*

public interest and the interests of pursuers on one side and of liable persons on the other. A strong case would be needed for the introduction of any defence that would weaken the ability of regulators to secure remediation, or which would pass costs to the taxpayer.

60 *There may be a stronger case for defences which relate to past contamination, especially in the distant past; the most deserving of further examination appear to be the "no-one could possibly have foreseen" and "what a court would have thought at the time" approaches. Both would present problems in trying to reconstruct what level of ignorance of hazards would have been justified at the time or what view a previous court might have taken.*

61 *It would be a major innovation to give more than evidential weight in Common Law cases to compliance with regulatory consents and so effectively exclude from private liability the effects of actions that were at the time subject to such consents.*

62 *Regulatory consents have not been drawn up on the basis that they would exempt consentees from their responsibility to prevent damage giving rise to liability. Such an exclusion might encourage regulators to become excessively cautious when drawing up the terms of consents to the general detriment of industry and not necessarily to the benefit of the environment. The defence would also deter pursuers from seeking redress, allowing liabilities to pass to the public sector.*

63 *There are already time limits in the common law relating to the appearance of damage rather than to the polluting event. Given the often concealed nature of contamination and its latent effects, especially where chemical changes in the ground or the movement of contaminants are involved, any event-related time limit would have to be very long to strike a fair balance between the interests of operators and regulators or pursuers.*

Issue E Who should pay for putting environmental damage right?

64 *The polluter pays principle must be central to any regulatory regime. It does not, however, necessarily follow that obligatory remediation should always and only be imposed on the actual polluter. For past pollution, the polluter may no longer be known, may have gone bankrupt or may not be able to pay for remedial work. The liabilities created by the pollution may have been taken into account explicitly in the price or other terms of subsequent land transactions.*

65 *Some degree of certainty is required both for regulators and business alike as to who may be subject to an obligation and under what circumstances. Regulators should generally aim first at the polluter and should not be able to spread their net unduly widely. On the other hand, it is a long standing principle that the owner of a property is responsible for its condition and for its effects on other properties. Much past pollution will:*

have been caused by the owner or occupier of a site as the person who carried out the polluting action; or

be the owner's responsibility, subject to any arrangements he may have made when buying the site or in leasing the site to the occupier.

66 It would follow that the primary target for a regulator seeking to enforce an obligation in respect of past pollution could be the owner and/or occupier of the site. This would be administratively economical, and the common law provides that person with the chance of sharing the burden if he could establish the liability of others. However, there are cases where individual householders face actual or potential obligations which could exceed the value of the property or deter would-be buyers so much that the property became worthless and there may be particular problems with so-called "orphan sites" where the polluter cannot be identified, or neither he nor any other responsible person has the resources required to stop pollution from contamination. If so, it may be necessary, in order to avoid unacceptable risks to human health or the environment, for the public sector to take responsibility.

Funding the burdens

67 Lastly, an important part is to be played by the private sector in providing a financial framework in which funds are available to clean up contamination and eliminate blight. This raises the question of whether liable persons or interested industrial or commercial groups should be required to make some form of advance payment, whether by way of insurance premiums, bonds or levies to provide a fund. The fund approach is discussed in the EC Green Paper which suggests that a fund may be appropriate to deal with areas such as orphan sites.

68 Compulsory insurance has been suggested for future activities which could cause contamination. Insurers are hostile to this, partly because of the difficulty in identifying whether contamination occurred before or after a policy was taken out. There is also a risk that the availability of insurance would come to determine what activities could be carried out rather than an efficient market developing to provide cover for alternative activities. Some companies are carrying the liabilities themselves. Others seek to share the risks through sectoral funds. In Denmark, for example, the major petrochemical companies have discussed with the Government setting up a voluntary fund to cover liabilities for contamination at petrol-filling stations, including those of independent operators.

Preliminary conclusions

69 *It is not inconsistent with the polluter pays principle to provide for the enforcement of regulatory obligations on others, especially the owner.*

70 *In the complex business world of diversified control, ownership and participation in profits, regulators should not be prevented from attributing costs alongside responsibility where that is shared or the legal liability has been transferred. Regulators should not be inhibited from taking urgent action simply because of the need to investigate the history of a particular contamination episode or the relevant legal relations.*

71 *However, regulators should be generally required to seek to recover their costs from those responsible for causing pollution before being permitted to pursue others, and the public purse should be the last resort.*

72 *In any event, where contaminated land has been dealt with at public expense and its value thereby enhanced, the land owner should not make an uncovenanted gain.*

73 *Notwithstanding the principle of caveat emptor, there may be cases where an obligation should be limited on grounds of financial hardship. Such a limitation might be particularly applicable to individual householders who have unwittingly bought property with major contamination problems.*

74 *The proposals in this paper will encourage risk assessment and preventative measures and thereby help the general insurance market to be more ready to insure businesses against the effects of contamination. There should be scope for individual sectors to set up their own, voluntary funding arrangements to spread liabilities whether for existing or future contamination. Compulsory insurance has not been shown to be practical or appropriate and there would seem to be little point in imposing a requirement which, in relation to historic pollution, no-one seems likely to underwrite.*

Issue F **How should markets be provided with information?**

75 When announcing the review in March 1993, the Secretary of State for Scotland also indicated that he would not be proceeding with proposals to implement section 143 of the EPA under which local authorities would be required to keep public registers of land subject to contaminative uses.

76 The section 143 registers would have brought together the readily available information about the past or present uses of sites in each local authority area. However, responses to the consultation exercise suggested that the information could have been misleading and lead to unfair blight in too many instances. The registers would not have stated definitively whether a site was contaminated or not, let alone by what substances and to what degree. Moreover, no entry, once validated, could have been deleted even if the site was in fact uncontaminated or any actual problems had been tackled.

77 At present, the Scottish Vacant and Derelict Land Survey is carried out jointly by The Scottish Office Environment Department, the regional, district and islands councils and Scottish Enterprise, normally every two years. The last survey for which full results are available was carried out in 1990. The main purpose of the survey is to identify the extent of vacant and derelict land. The survey covers all known derelict land in Scotland and vacant land in and around urban areas - vacant land in rural areas is not included. The survey asks questions about contamination but cannot provide the full picture as it does not set out to compile comprehensive data about contamination and does not include any land currently in use. The position on contamination is unknown on the vast majority of the 5435 sites surveyed but of those, 2770 were thought not to be

contaminated. Every effort is made to improve the quality of the data in the survey, including whether or not contamination has been found.

78 The principle of caveat emptor - that the buyer should ask appropriate questions but that the seller is liable for the truth of his answers - is important in all transactions including buying and selling land and the securing of loans against an interest in property. It is argued, however, that caveat emptor can operate unfairly if the parties to the relevant transactions could not possibly have known about a contamination problem at the time. That can happen where the contamination comes to light long after the polluting event or where the pursuer or the regulator is not able to establish that the consequences were damaging until a later date. In such circumstances an 'innocent' owner may find that he has a liability without having any opportunity to get a reduction in purchase price or a seller's warranty. This is arguably unfair and constitutes a disincentive to the marketing and use of potentially contaminated land, and has led to the suggestion that sellers should be put under a duty to disclose information without being asked for it. However, such a change would make it less certain who should be held liable for clean-up of a particular site.

79 There is already a growing market response in the provision of information obtained by examining old maps and other sources to identify potential contamination. Moreover, local authorities have had a duty since 31 December 1992 to disclose environmental information which can include information about actual or potential contamination. Professional advisers undertaking valuations or searches preparatory to conveyances are increasingly using these or other means of finding out about and evaluating contamination problems.

80 In its response to the section 143 proposals, the Royal Institute of Chartered Surveyors (RICS), supported by other bodies, proposed that all or some selected planning applications should be accompanied by a Land Quality Statement (LQS). The LQS would remain on the planning register and so be available as a source of information, especially to regulators and would-be purchasers. The coverage of the country by LQs would, of course, depend on where planning applications were made and on the way in which authorities exercised discretion in requiring them. Many sites would not be covered for many years.

81 The Government is conducting a programme of research intended to consolidate existing knowledge, to increase understanding of the risks from contamination, and to provide guidance on how best to assess those risks and set priorities for treatment. The research is aimed at areas where the market-led approach is failing to deliver adequate information.

Preliminary conclusions

82 *Markets are effective when owners, purchasers and sellers alike are as well informed as possible. The Government intends to continue its research programme and to publish reports and guidance which will be widely available.*

83 *It appears that implementing section 143 of the EPA may not be necessary to ensure an efficient market in land and to ensure that contamination is put right.*

84 *In the vast majority of transactions, putting sellers under a duty to disclose information without being asked for it would add little that would be enforceable to the duties of sellers. The current clear responsibility and incentive on each new participant to play a full role in the identification of contamination and in the consideration of necessary remedial action are important features which should not be lost. Caveat emptor should therefore be preserved.*

85 *If buyers are unwilling to buy where information is limited then the market is giving an incentive for sellers to find out about and declare the condition of their land to facilitate sales.*

Issue G What other roles should public sector bodies have?

86 Under the general regime outlined above, land values of contaminated sites might sometimes be negative. Where the owner of the land does not have other funds to clean up the contamination, this may result in the land remaining unusable. It has been suggested, however, that land use planning decisions which restrict the availability of greenfield sites could help increase the demand for, and the value of, brownfield sites including those with contamination problems.

87 Scottish Enterprise (SE), Highlands and Islands Enterprise (HIE) and the local enterprise companies (LECs) have a particularly important role to play where lack of action on a particular contaminated site stands in the way of its beneficial development, or blights the development or amenity of the wider area. Their role should be essentially a catalytic one to help overcome the constraints which may stand in the way of the land owner or potential developer improving the land or bringing it back into use.

88 SEPA will also have an important role. It will be successor to the powers currently exercised by HMIPI, the river purification authorities and the waste regulation and local air pollution control functions of the district and islands councils, including those to require remedial works to be carried out, or to undertake them and to recover costs. SEPA might also take on a role in providing advice, guidance and research on handling the risks from contaminated land. SEPA would therefore have a duty to inspect closed landfills and, where necessary, take remedial action under section 61 of the EPA, if the section were implemented. However, consultation on the implementation of section 61 of the EPA has revealed that there would be practical difficulties in carrying out this duty.

Preliminary conclusions

89 *The role of SE, HIE and the LECs, as the principal sources of public sector support for the regeneration and, where appropriate, redevelopment of contaminated sites, will continue. The resources available to them are, however, finite and need to be prioritised; and work is already under way to identify best practice in remediation and to rank sites and priorities so as to target resources most effectively. They will continue to make a substantial contribution towards remediation efforts but their aim will continue to be to encourage private sector investment and development and not to replace private with public sector liabilities.*

90 *SEPA could be given a general responsibility to establish a framework of guidance within which remediation of contaminated land could be addressed. This might include guidance on the extent and associated risks of different types of contamination, and on the most suitable approach to treatment for each type. Such guidance would need to be drawn up following wide consultation and would be designed to improve understanding of risks and to assist the private sector in ensuring that land is treated to appropriate standards. SEPA would not be responsible for funding remedial work and its role must be complementary to that of SE, HIE and the LECs.*

91 *The role of the planning system in encouraging the investigation, reporting, assessment and remediation of land as part of the process of ensuring its beneficial use or re-use will continue.*

92 *The existing proposals for the future of section 61 of the EPA will need to be reviewed in the light of the general recommendations from this Review and of the other emerging institutional changes. It should not be brought into force until the necessary amendments have been made and responsibilities have been transferred.*

V. RESPONDING TO THIS CONSULTATION PAPER

93 Anyone who wishes to comment on the preliminary conclusions in this paper should write to:

Lawrie Anderson
Air and General Environment Protection Division
The Scottish Office Environment Department
Room 205
83 Princes Street
EDINBURGH
EH2 2ER

94 The preliminary conclusions can be found at paragraphs 38, 47-50, 52-54, 59-63, 69-74, 82-85 and 89-92.

95 The closing date for responses to this consultation paper is 26 May 1994.

96 It is the Government's practice to make responses to consultation papers available to Parliament and for public inspection in its libraries. Unless you specifically indicate that your response is to be kept confidential, The Scottish Office will assume that you have no objection to its being made publicly available.

97 Further copies of this paper are available from The Scottish Office Environment Department at the address given in paragraph 93.

98 A parallel, but separate, consultation paper - "Paying for our Past" has been issued in England and Wales by the Department of the Environment and the Welsh Office, reflecting the different administrative and legal arrangements south of the Border. Copies are available from:

Paul Watkinson
Contaminated Land and Liabilities Division
Department of the Environment
Room A310
Romney House
43 Marsham Street
LONDON
SW1P 3PY

The Scottish Office
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